INDIA -- MEASURES AFFECTING THE AUTOMOTIVE SECTOR

(WT/DS146-175)

SECOND SUBMISSION OF
THE UNITED STATES OF AMERICA

APRIL 25, 2001

TABLE OF CONTENTS

I. SUMMARY OF ARGUMENT

1. In our previous submissions, the United States explained that the indigenisation and trade balancing requirements of Public Notice No. 60 and the MOU's signed thereunder are inconsistent with India's obligations under GATT Article III:4, GATT Article XI:1, and TRIMs Agreement Articles 2.1 and 2.2.

2. India's defense has principally relied on two procedural arguments: that the elimination of import licensing on April 1, 2001, has also eliminated the basis for the United States' claims; and that the ruling in favor of the United States in *India-QR's* prevents this Panel from examining the United States' claims. Neither of India's assertions can be sustained, however. The indigenisation and trade balancing requirements at issue in this dispute are separate from the import licensing regime; they have been binding and enforceable both before and after April 1, 2001; they were not part of the *India-QR's* case; and they are independently inconsistent with India's WTO obligations. Part II of this submission develops these points further.

3. While most of India's argumentation has concentrated on those procedural points, India also briefly argues that Public Notice No. 60 and the MOU's are consistent with Articles III:4 and XI:1 of the GATT. India, however, has not dealt with the argumentation that the United States put forward. Nor has India explained away the actual language in Public Notice No. 60 and the MOU's. The texts of those measures establish that they do, in and of themselves, both restrict imports and discriminate against foreign goods. Part III of this submission develops these points further. Part III also addresses a new point that appears for the first time in India's responses to the Panel's questions: that these measures are allegedly not "investment measures" within the scope of the TRIMs Agreement.

4. Finally, in its first submission and at the first panel meeting, India also suggested that it has a defense to this complaint under the balance-of-payments provisions of the GATT. India produced no evidence in support of this statement, however, and India has therefore not even made out a *prima facie* defense under those provisions. In any event, India could not do so. As the United States pointed out at the first meeting, India has not met the procedural and substantive prerequisites for relying on the balance-of-payments provisions. Furthermore, information from the Reserve Bank of India (India's central bank) shows that at all times relevant to this dispute, India's currency reserve position did not justify trade measures of any kind, including the ones at issue here. These points are further developed in Part IV of this submission.

II. INDIA'S PROCEDURAL OBJECTIONS SHOULD BE REJECTED

A. India's Elimination of Import Licensing on April 1, 2001, Did Not Eliminate the Basis for This Dispute

5. India began its first written submission by describing the measures it will apply after import licensing for SKD/CKD kits and components is removed on April 1, 2001. According to India, the elimination of those licensing requirements also eliminates the legal basis for the United States' complaint. India is incorrect, for several reasons.

6. Most fundamentally, the distinction that India tries to draw between the situation before April 1, 2001, and the situation after April 1, 2001, is contradicted by India's acknowledgment that the MOU's will remain in force even after April 1, 2001, and by India's further acknowledgment that the trade balancing and indigenisation requirements in the MOU's remain binding and enforceable after that date.[1] In fact, in addition to reconfirming that these requirements remain enforceable in Indian courts, India's answers to the Panel's questions also confirmed that they are enforceable through monetary penalties levied under Section 11 of the FT(DR) Act.[2]

7. Those acknowledgments necessarily mean that the trade balancing and indigenisation requirements are legally independent of the licensing requirements that India previously imposed on imports of SKD/CKD kits and components. As the United States has made clear, it is not the licensing requirements but the indigenisation and trade balancing requirements that are the subject of the U.S. complaint in this dispute. Because the indigenisation and trade balancing requirements did not change on April 1, 2001 (or on any other date), and because those requirements are independent of India's now-eliminated licensing regime, India's elimination of import licensing is not relevant to -- and certainly does not resolve -- this dispute.

8. In its answers to the Panel's questions, India appears to have finally recognized this point. India says, "there are requirements set out in the MOU's that apply also in the absence of any import restriction on SKD/CKD kits."[3] The United States agrees: and it is those MOU requirements -- and their inconsistencies with India's WTO obligations -- that are the subject of this dispute.

9. In that same answer, however, as in its first written submission, India regrettably persists in arguing that the situation after April 1, 2001 (*i.e.* after elimination of the import licensing

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[1] First submission of India, para. 12. The position is less clear with respect to Public Notice No. 60; as far as the United States can tell, this notice has not been rescinded and thus remains in force. India says only that "Public Notice No. 60 is no longer operational because the licensing scheme it was to administer no longer exists." Answers to the Questions from the Panel to India ("Indian Panel Answers"), answer to question 33.

[2] "As pointed out above, after the abolition of import licensing for CKD/SKD kits on 1 April 2001, MOU's potentially can be enforced as contracts through the domestic courts. The companies may also be liable to monetary penalties under Section 11 of the FTDR Act." Indian Panel Answers, answer to question 52(d).

[3] Indian Panel Answers, answer to question 33.

regime) is somehow different from the situation before that date. According to India, enforcement of the MOU's "could not have arisen at the time when the EC [or, presumably, the U.S.] submitted its request for the establishment of the Panel. The Panel would therefore be ruling on a prospective matter - that is, a legal situation which did not exist at the time of its establishment - if it were to examine the legal effects of MOU's after the abolition of the licensing regime. This prospective matter is outside its terms of reference."[4]

10. India's argument relies on several misunderstandings. First, the U.S. complaint is not directed at any particular method or means of enforcing the MOU's and Public Notice No. 60. The U.S. complaint is instead directed to the indigenisation and trade balancing requirements as such, and these requirements have not changed. These requirements have imposed the same obligations on car manufacturers since the date that the MOU's were signed, and it is the U.S. position that those obligations are themselves inconsistent with India's WTO commitments. What matters is that those obligations are binding and enforceable; what means India chose or will choose to enforce them is simply not relevant to the U.S. legal claims in this dispute.[5]

11. The text of the GATT 1994 makes this point clear. Article III:4 of the GATT 1994 is addressed to "... laws, regulations and requirements ... ." The indigenisation and trade balancing requirements are indisputably "requirements"; and they remain "requirements" regardless of what methods India uses to enforce them.[6] India's position -- that the Panel should focus not on the requirements that the measures impose but should look instead at changes in the means of enforcement -- is simply not consistent with the GATT text. The situation is no different for Article XI:1: the scope of that article has always been interpreted to be broad, and it uses the term "measures," the meaning of which is at least as broad as the term "requirement".[7]

12. India's position is also inconsistent with the conclusions reached by the *FIRA* panel. That panel found as follows:

> The Panel further noted that written purchase undertakings -- leaving aside the manner in which they may have been arrived at (voluntary submission, encouragement, negotiation, etc.) -- once they were accepted, became part of the conditions under which the investment proposals were approved, in which case compliance could be legally enforced. The Panel therefore found that the word

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[4] *Ibid.*

[5] Thus, even if it were true that before April 1, 2001, "as long as India maintained its import licensing regime for SKD/CKD kits, the only possible legal consequence of the non-observation of the terms of a MOU was therefore the denial of an import license for such kits" and that a manufacturer could have resisted court enforcement of the MOU's on that basis (Indian Panel Answers, answer to question 33), the fact remains that the enforceability as such of the requirements in the MOU's has not changed.

[6] Furthermore, Public Notice No. 60 is certainly also a "regulation".

[7] *See* First Submission of the United States, paras. 89-93 and panel reports cited; *cf. also* Panel Report on *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted on 29 April 1998, para. 10.51: "Given that the scope of the term *requirement* would seem to be narrower than that of *measure*, the broad reading given to the word *requirement* by the *Canada - FIRA* and *EEC - Parts and Components* panels supports an even broader reading of the word *measure* in Article XXIII:1(b)."

> "requirements" as used in Article III:4 could be considered a proper description of existing undertakings.[8]

It was the enforceability of the undertakings -- not the specific means of enforcement -- that led the *FIRA* panel to conclude that the undertakings were "requirements" within the meaning of GATT Article III:4. Notably, none of the undertakings examined in the *FIRA* dispute had ever actually been enforced by the Canadian Government; performance of unfulfilled undertakings had always been either postponed or waived, or the undertakings had been replaced by revised undertakings.[9] This fact did not change the Panel's legal conclusion that the undertakings imposed "requirements" that were inconsistent with the GATT.

13. India is also wrong to say that the situation after April 1, 2001, is outside the Panel's terms of reference. This Panel's terms of reference are:

> To examine, in the light of the relevant provisions of the covered agreements cited by the United States in WT/DS/175/4 and by the European Communities in WT/DS146/4, the matters referred to the DSB by the United States and the European Communities in those documents and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[10]

The "matters referred to the DSB by the United States" in document WT/DS175/4 include "Public Notice No. 60 ((PN)/97-02) of the Indian Ministry of Commerce, published in the Gazette of India Extraordinary, effective 12 December 1997; ... memoranda of understanding signed by the Government of India with manufacturing firms in the motor vehicle sector pursuant to Public Notice No. 60 ... ." India's admission that "there are requirements set out in the MOU's that apply also in the absence of any import restriction on SKD/CKD kits" makes clear that those requirements fall within the terms of reference of this panel.

14. Furthermore, India's focus on the elimination of import licensing misapprehends the limited relevance of import licensing to this dispute. India used those licenses to induce car manufacturers in India to accept the indigenisation and trade balancing requirements. Car manufacturers had to sign an MOU in order to receive those licenses and to import CKD/SKD kits. As a matter of factual background, therefore, it is relevant that import licensing existed in 1997 and 1998, when the MOU's were signed. With respect to our legal claims, the import licenses constitute an "advantage" that MOU signatories received in exchange for binding

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[8] Panel Report in *Canada - Administration of the Foreign Investment Review Act ("FIRA")*, L/5504, adopted on 7 February 1984, BISD 30S/140, para. 5.4.

[9] *Id.*, para. 2.11.

[10] *India – Measures Affecting the Automotive Sector: Constitution of the Panel Established at the Requests of the United States and the European Communities: Note by the Secretariat*, WT/DS146/5, WT/DS175/5, 30 November 2000, para. 2. These are standard terms of reference drawn up in accordance with DSU Article 7.1.

themselves to the indigenisation and trade balancing requirements.[11] The *FIRA* panel considered an analogous situation: permission to establish an investment in Canada was conditioned on compliance after investment with various GATT-inconsistent undertakings. In this dispute, access to the import licenses plays the same role as the permission to invest played in that one: as the one-time "advantage" provided by the government to induce companies to accept on-going WTO-inconsistent requirements.

15. In a related point, India also asserts that Public Notice No. 60 is no longer "operational".[12] As a matter of fact, the status of Public Notice No. 60 is not at all clear. To the best of the United States' knowledge, Public Notice No. 60 has not been rescinded. India has not explained what it means for an Indian regulation not to be rescinded and yet not be "operational".

16. In any event, even if Public Notice No. 60 were no longer in force, it remained in force for several months after the establishment of this Panel (July 27, 2000, for the U.S. complaint) and the fixing of the Panel's terms of reference on that date; the Panel can and should make findings concerning it. As the United States explained in answering the Panel's question 7, past GATT and WTO panels have ruled on measures that were discontinued during the panel's examination.[13] It would be particularly appropriate for the Panel to rule on Public Notice No. 60 in this case, given that the requirements of Public Notice No. 60 are still in place through the MOU's, which all parties agree remain in effect, binding and enforceable. The Panel would thus achieve no economy by omitting Public Notice No. 60 from its findings; to the contrary, as long as there is uncertainty over the status of Public Notice No. 60, such a ruling could help ensure clear implementation of the DSB's rulings and recommendations.[14]

17. In summary: as long as the MOU's remain in force, the WTO-inconsistent indigenisation and trade balancing requirements remain in force. Second, as India has confirmed, the MOU's, and therefore also those two requirements, are binding and enforceable independently of the import licensing requirements, and will remain so even after the import licensing requirements

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[11] *See, e.g.,* the Report of the Panel in *EEC - Parts and Components*, L/6657, adopted on 16 May 1990, BISD 37S/132, para. 5.21 (those requirements "which an enterprise voluntarily accepts in order to obtain an advantage from the government constitute 'requirements' within the meaning of" GATT Article III:4). And, in the terms of the chapeaux to paragraphs 1 and 2 of the TRIMs Agreement Illustrative List, undertaking to comply with those two requirements was "necessary to obtain an advantage"-- namely, the right to receive import licenses.

[12] Indian Panel Answers, answer to question 33.

[13] Such cases include: the Report of the Panel in *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted as modified by the Appellate Body on other issues on 22 April 1998, para. 6.12; the Report of the Appellate Body in *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted on 23 May 1997, page 1; and the Panel Report on *Indonesia – Certain Measures affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 25 September 1997, para. 14.9.

[14] As the Appellate Body has explained, "A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'" Report of the Appellate Body in *Australia - Measures Affecting Importation of Salmon* WT/DS18/AB/R, adopted on 6 November 1998, para. 223 (quoting DSU Article 21.1).

are removed. Therefore, the date of April 1, 2001, has no relevance to the legal issues before this Panel and provides India no defense to the U.S. claims.

B. The Panel's Examination of the Matter at Issue in This Dispute is Not Barred by the Decision in the *India-QR's* Dispute

18. In its first written submission, India asserted that this Panel is not able to consider the U.S. complaint because (according to India) "the matter raised by the United States has already been adjudicated by the DSB ... [and] the re-invocation of the DSU in respect of the matter raised by ... the United States is inadmissible."[15]

19. India's assertion has no merit for several reasons. First, contrary to India's assertion, the rulings in the *India-QR's* dispute did not adjudicate the matter that the United States has brought before this Panel. Second, India is inviting the Panel to analyze legal issues that are not presented by the facts of this case and therefore are not necessary to the resolution of this dispute; the Panel should decline that invitation. Third, because the measures and claims at issue in this dispute are different from those at issue in *India-QR's*, this Panel's rulings will apply to discrimination and import restrictions that the *India-QR's* panel could not and did not address.

1. The *India-QR's* Dispute Does Not Overlap This One; For That Reason Alone, the Panel Should Conclude that India's Arguments Lack Merit

20. As the United States has explained, the measures challenged in this dispute are not measures that were the subject of the *India-QR's* case, and the claims at issue in this dispute were not claims at issue in that one. In response to the Panel's question 5, the United States detailed the differences between the *India-QR's* dispute and this one. To summarize:

-- In *India-QR's*, the United States challenged the existence of India's non-automatic import licensing system as such, and not the application of specific criteria for licensing the importation of specific tariff line items. For example, the United States noted in that case that "all that the United States knew was that the Indian licensing authority generally refused to grant import licences for 'restricted' items when it was considered prejudicial to the state's interest to do so."[16]

-- India had the same view of the case: it "reserved its position on the allegations of the United States with respect to the application of India's import restrictions, in terms of both their factual basis and their legal implications."[17]

-- Furthermore, the *India-QR's* panel's findings confirm that the panel too had that view: "we note that it is agreed that India's licensing system for goods in the

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[15] First Submission of India, para. 51.

[16] Panel Report in *India-QR's*, WT/DS90/R, adopted on 22 September 1999, para. 3.20.

[17] *Id.*, para. 3.41.

> Negative List of Imports is a discretionary import licensing system, in that licences are not granted in all cases, but rather on *unspecified* 'merits'. We note also that India concedes *this measure* is an import restriction under Article XI:1."[18]

21. By contrast, the dispute before this Panel does not concern India's non-automatic licensing regime. It concerns instead different measures (those specified in the U.S. panel request, particularly Public Notice No. 60 and the MOU's) and different requirements (the indigenisation requirement and the trade balancing requirement) that India imposes on car manufacturers and on automotive parts and components.

22. Furthermore, this dispute raises different legal issues: First, do those requirements as such (apart from import licensing) impose prohibitions or restrictions on imports in violation of GATT Article XI:1? In the U.S. view, those requirements do impose such import restrictions, but the particular restrictions at issue here (limitations correlated to projected and achieved export values and to the degree of local content) are different from the very existence of non-automatic licensing that was at issue in the *India-QR's* dispute. Second, do those requirements as such (apart from import licensing) impose discrimination against imported goods in violation of GATT Article III:4? The U.S. view is that these requirements treat imported goods less favorably than like domestic goods -- and that is a claim that even India realizes was not and could not have been a part of the *India-QR's* dispute.

23. The measures in this dispute are different, and the legal claims in this dispute are different. Consequently, in the terminology of DSU Article 7.1, the "matters" in the two disputes are different,[19] and therefore this dispute was not even addressed, let alone "adjudicated" (to use India's terms), by that prior panel.

24. In its responses to the Panel's question 36, India seems to have accepted the distinction between its import licensing regime and the requirements at issue in this case:

> The complainants thus appear to accept that a Member cannot resort to DSU twice with respect to the same matter but that their claims are different from that those that were the subject of the prior DSU proceedings. They asserted in particular that Public Notice No. 60 and the MOU's impose requirements and restrictions within the meaning of Articles III:4 and XI:1 of the GATT and the corresponding provisions of the TRIMS Agreement even in the absence of the discretionary licensing scheme that India was obliged to eliminate as a result of the prior proceedings.

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[18] *Id.*, paras. 5.130 (footnotes omitted) (emphasis added).

[19] "The '*matter* referred to the DSB', therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)." Report of the Appellate Body in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted on 25 November 1998, para. 72.

> India therefore assumes that the issue before the Panel is no longer the scope of the principle of *res judicata* but rather the question of whether Public Notice No. 60 and the MOU's impose requirements and restrictions even in the absence of the licensing scheme for CKD/SKD kits.

25. India is essentially correct about the U.S. claims with respect to Public Notice No. 60 and the MOU's. Moreover, as India notes, the issue before the Panel is not the scope of *res judicata* (or any of the other "principles" that India invoked in aid of its argument) -- regardless of the precise meaning of India's "principles", this case does not involve the reprise of a dispute that has already been adjudicated, nor the "splitting" of a single matter in two.

26. In light of this common ground on the issues before the Panel, the Panel should not tarry over India's assertions earlier in this dispute that its position is justified by a " principle of *res judicata*";[20] or a "principle of abusive splitting"[21]; or a principle of "good faith".[22] There is no need for the Panel to consider whether such principles exist under the WTO Agreement, and if so what their scope might be -- those are legal issues that are neither presented by the facts before the Panel nor necessary to the resolution of this dispute.

2. In Any Case, India's Approach is Unsupported

27. Even if the Panel were inclined to pursue the legal issue that India has raised, it would have to conclude that India's analysis is without basis in the text of the WTO Agreement.

28. India gives no citation at all for its so-called "principle of abusive splitting"; its one textual reference -- namely, to the phrase "satisfactory settlement of the matter" in DSU Article 3.4 -- does not support its position, for the straightforward reason that the "matter" at issue in this dispute is different from the "matter" at issue in the *India-QR's* dispute.

29. India seeks to supports its "principle of *res judicata*" by reference to a decision of the International Court of Justice (ICJ) and a statement of the Appellate Body in the *Japan - Taxes on Alcoholic Beverages* dispute. But neither of those cases provides any help for India's position here. In *Japan - Taxes*, the Appellate Body *rejected* a claim that prior GATT panel decisions constituted binding precedent.[23] As for the ICJ's advisory opinion in *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, while that opinion mentioned *res judicata* it did not define what it meant by that term. In any event, the question posed to the ICJ in that case was "Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation

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[20] First Submission of India, para. 40.

[21] *Id.*, para. 49.

[22] Statement of India at the First Meeting, para. 9.

[23] Report of the Appellate Body in *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, Part E.

made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?"[24] (*I.e.*, was the General Assembly required to pay the award rendered by the tribunal?) The decision therefore does not address the question whether a tribunal hearing a subsequent dispute is in any sense bound by a previous tribunal decision, and therefore it is inapposite to India's contentions here.

30. India's "good faith" argument is equally unavailing. India refers to the provision in DSU Article 3.10 that "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." The Appellate Body's construction and application of that phrase, however, do not help India's position. In its report in the *FSC* dispute, the Appellate Body said:

> By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.[25]

The Appellate Body was considering purely a question of timing -- whether or not an objection to a consultation request had been timely raised. In a subsequent case the Appellate Body considered the application of Article 3.10 to another question of timing -- whether or not a Member had asked for clarification of a panel request in a timely manner.[26] Nothing about Article 3.10 or the Appellate Body's construction of that provision has anything to do with "res judicata", "splitting", or the binding nature in a subsequent dispute of a ruling in an earlier one.

31. In effect, India is inviting this Panel to embark on an examination of "principles" that are not anchored in the text of the DSU. Previous panels have rejected similar attempts by India to obtain procedural rulings that are not based on the language of the DSU; as we pointed out in our answers to the Panel's questions, the *EC Mailbox* panel properly concluded that a panel proceeding was not the appropriate forum to address systemic issues. The Panel explained that it was required to base its findings on the language of the DSU and could not make a ruling *ex aequo et bono* divorced from explicit language in the DSU.[27]

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[24] (1954) I.C.J. Rep. 50.

[25] Report of the Appellate Body in *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted on 20 March 2000, para. 166.

[26] Report of the Appellate Body in *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted on 5 April 2001, para. 97.

[27] Panel Report in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R, adopted on 22 September 1998, paras. 7.22-7.23.

32. In this case, not only has India failed to ground its argumentation in the text of the WTO Agreement, it has also not made any effort to deal with other DSU provisions that lead to the opposite conclusion. For example, India's position is at odds with DSU Article 3.7, which the Appellate Body noted in the *Bananas* report "suggests ... that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'."[28] For similar reasons, India's position is also at odds with DSU Articles 3.3 and 7.1: Much like Article 3.7, DSU Article 3.3 emphasizes the importance of resolving the claims that a complaining Member "considers" to be impairing its benefits under the WTO Agreement,[29] and DSU Article 7.1 allows the complaining Member to define the measures challenged and the legal claims advanced. Furthermore, India's position is at odds with DSU Article 3.2, which, if India is correct, would be ignored in this case because violations of Article XI:1 and III:4 would go unaddressed.[30]

33. The same considerations apply here as applied in *EC-Mailbox*: the text of the DSU requires the Panel to examine the matter that the United States has placed before it. Nothing in the language of the DSU supports the argument that India has made.

3. India is Mistaken to Argue that Indigenisation and Trade Balancing are "Inherent" Aspects of Its Import Licensing Regime

34. Despite acknowledging that the scope of "*res judicata*" is not an issue in this dispute once the U.S. claims are properly understood, India nevertheless insists that Public Notice No. 60 and the MOU's are "an inherent part of the licensing scheme" that India has now eliminated.[31] India also maintains that it "fails to understand what interest protected by the DSU the EC and the United States are pursuing by requesting rulings on the specific conditions attached to the grant of licenses for SKD/CKD kits when they have already obtained an agreement and a DSB ruling according to which the whole licensing scheme for such kits must be eliminated on 1 April 2001 and the scheme was in fact eliminated on that date."[32]

35. With respect to India's first point: There is nothing "inherent" about the indigenisation and trade balancing requirements. Import licensing of the kind that India maintained until April 1, 2001, can easily be administered without imposing export requirements or requiring discrimination in favor of domestic goods. India gives the Panel no reason to believe otherwise. In any case, India has effectively confirmed this point by saying that "it would in any case have been totally impracticable for India to notify these details [*i.e.,* the details of the licensing regime India applied to each restriction notified under Article XVIII:B] for 2,700 items and for the

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[28] Report of the Appellate Body in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted on 25 September 1997, para. 135.

[29] Article 3.3 provides that "the prompt settlement of situations *in which a Member considers* that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members" (emphasis added).

[30] DSU Article 3.2 provides that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

[31] Indian Panel Answers, answer to question 37.

[32] *Id.*, answer to question 38.

Committee on Balance-of-Payments Restriction to examine them." The fact that those details vary by item makes clear that no one set of administrative details is inherent in the restrictions themselves.

36. Moreover, the indigenisation and trade balancing requirements are continuing in force even though the import licensing regime has been eliminated, as India has acknowledged. This too demonstrates that they are independent of, and not inherent in, that licensing regime.

37. The fact that those requirements are continuing also answers India's second point. What the United States seeks is a ruling whose legal consequences would entail the elimination of separate import restrictions imposed by Public Notice No. 60 and the MOU's, as well as the elimination of the less favorable treatment that Public Notice No. 60 and the MOU's accord to imported automotive parts and components than to like domestic parts and components. By contrast, the legal consequences of the rulings in the *India-QR's* report entail the elimination of the import licensing requirement for a large number of goods, including SKD/CKD kits, a different matter entirely. Contrary to the position taken by India at the first panel meeting,[33] eliminating the latter will not eliminate the former.

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38. In summary, this case is not the *India-QR's* case; and what is at issue here was not adjudicated there. That point alone disposes of India's arguments about *res judicata*, etc. In addition, however, India's arguments are neither sustained nor sustainable, and would require this Panel to undertake a detailed legal analysis that neither the facts of this case nor the text of the DSU warrant. For all those reasons, the Panel should simply conclude that the facts of this case do not raise the legal issue that India has presented, and should reject those arguments without seeking to elaborate the legal issues any further.

III. THE PANEL SHOULD REJECT INDIA'S RESPONSES TO THE U.S. CLAIMS UNDER THE GATT AND THE TRIMS AGREEMENT

39. The United States' first submission presented the facts and legal arguments necessary to establish that the indigenisation and trade balancing requirements are inconsistent with India's obligations under Articles III:4 and XI:1 of the GATT and Articles 2.1 and 2.2 of the TRIMs Agreement. India has only barely addressed the substance of the U.S. claims, and this Panel should reject the very few substantive responses that India has made.

A. India Has Not Refuted the U.S. Claims Concerning GATT Article III:4

40. In our first submission, the United States explained that the indigenisation requirement is in plain contravention of GATT Article III:4. Manufacturers can meet their indigenisation

[33] Statement of India at the First Meeting, para. 8, final bullet point.

obligation only by purchasing and using Indian parts and components instead of imported ones in their production of motor vehicles; furthermore, the mandatory percentage of Indian-origin components increases over time. The indigenisation requirement thus accords a competitive advantage to domestic goods, and therefore provides less favorable treatment to imported goods.[34]

41. India does not advance any meritorious defenses to this claim. India first says that it "is committed to resolving [this situation] in a manner that does not entail any inconsistencies with its WTO obligations".[35] This statement, however, does not change the fact that the indigenisation requirement is inconsistent with Article III:4, and that it will continue to be so for as long as any one of the MOU's is in force.

42. India also asserts that "Article III:4 of the GATT can be violated only through 'laws, regulations and requirements', and Article 2 of the TRIMS Agreement only through 'measures' adopted by a Member. The MOU's, as such, and the conduct of firms under those MOU's, by itself, are therefore not covered by these provisions of the GATT and the TRIMS Agreement." The second sentence is simply incorrect: as the United States has repeatedly explained, it has been clear since the *FIRA* and *EEC-Parts and Components* reports -- and has been reaffirmed several times since -- that private companies' contractual commitments to a government constitute "requirements" and "measures" that are subject to the provisions of the WTO Agreement.[36] India has never responded to this point.

43. The United States' first submission further explained that the trade balancing requirement also contravenes GATT Article III:4. All imported SKD/CKD kits carry with them an obligation to export from India goods (components or finished vehicles) with an FOB value equal to the CIF value of the imported kits. Consequently, by using imported SKD/CKD kits/components rather than like domestic kits/components, manufacturers incur and their finished products must bear various costs (such as those arising from disruptions to their distribution plans and other commercial planning) that result from the trade balancing requirement's export mandate.

44. Moreover, the trade balancing obligation attaches not only to SKD/CKD kits that a manufacturer itself imports, but also to those imported SKD/CKD kits that the manufacturer purchases within India.[37] Because the requirement attaches to goods purchased within India, a number of other forms of discrimination arise as well. For example, a manufacturer seeking to meet its export obligation through the export of finished vehicles will purchase domestic components rather than imported kits -- because purchasing an imported kit would only further increase the manufacturer's export obligation, while purchasing the like domestic kit will not. Similarly, a manufacturer that needs to reduce an excess inventory of SKD/CKD kits or components will, all other things being equal, find a readier market for domestically produced

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[34] *See generally* First Submission of the United States, paras. 60-81.

[35] First Submission of India, para. 13.

[36] *See* First Submission of the United States, paras. 65-70.

[37] India has reconfirmed this point in its answer to the Panel's question 47(b).

kits than imported ones, because the imported ones carry with them the additional burden of the trade balancing requirement and the domestic ones do not.

45. For all these reasons, the trade balancing requirement accords less favorable treatment to imported goods than it accords to like domestic goods; and it will continue to do so as long as the trade balancing requirement in the MOU's remains in force.

46. The only response that India has advanced does not have merit. India claims that export requirements as such are not prohibited by the GATT; India cites the *FIRA* panel report in support of its position.[38] India overlooks, however, that the U.S. claims are directed at a *discriminatory* export obligation. Not all like products are subject to the export requirement; the requirement applies only to imported goods. An internal regulation that is otherwise consistent with the WTO Agreement becomes inconsistent if, like the trade balancing requirement in this case, it applies to imported products but not to like domestic ones. There is nothing to the contrary in the *FIRA* report; that dispute did not involve export requirements applied exclusively to imported goods.

47. The more appropriate precedent is the *EEC-Animal Feed Proteins* report: as the United States has previously explained,[39] this dispute, like *Animal Feed Proteins*, involves a measure that imposes a burden on those who use imported goods but not on those who use like domestic goods (the obligation to buy milk powder from intervention agencies in that case, the obligation to export finished vehicles or auto parts in this one). As the *Animal Feed Proteins* recognized, such a measure is inconsistent with Article III:4. India has not responded to this point either.

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48. In summary: the defenses that India has advanced to the U.S. claims should be rejected. The Panel should find that both the indigenisation and the trade balancing requirements discriminate against imported goods and are inconsistent with India's commitments under GATT Article III:4.

B. India Has Not Refuted the U.S. Claims Concerning GATT Article XI:1

49. The United States' submissions have further demonstrated that the indigenisation and trade balancing requirements are also inconsistent with Article XI:1 of the GATT 1994.[40] India denies that Article XI:1 applies to these requirements, but India has misinterpreted that provision. India also denies that Public Notice No. 60 and the MOU's themselves impose restrictions on imports; however, not only can that assertion not be reconciled with the actual language of the measures, but it does not appear even to be consistent with India's own statements.

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[38] First Submission of India, para. 12(b).

[39] First Submission of the United States, para. 85.

[40] First Submission of the United States, paras. 87-103, and Response of the United States to Questions from the Panel, paras. 35-41.

50. The United States has explained that the *trade balancing* requirement restricts imports because it limits the value of an MOU signatory's imports to the value of the signatory's exports (which, pursuant to paragraph III, clause (vi), the MOU signatory is required to specify at the time of signing). There are obviously limitations on the amount of exports which a car manufacturer may be able or willing to make. Thus, by limiting the amount of a manufacturer's imports to that of its exports, the trade balancing requirement itself restricts imports.

51. India appears not to accept that such a requirement is inconsistent with Article XI:1 of the GATT: "Article XI of the GATT and Article 2 of the TRIMS Agreement merely prohibit export requirements that are imposed as a condition for the grant of an import license and export requirements that vary with the level of local purchases."[41] This assertion is simply incorrect, as paragraph 2 of the TRIMs Agreement Illustrative List shows:

> TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are ... enforceable under domestic law ... or compliance with which is necessary to obtain an advantage, and which restrict the importation by an enterprise of products used in ... its local production ... to an amount related to the ... value of local production that it exports ... .

It is clear that the MOU's restrict importation to an amount related to the value of locally produced goods that a manufacturer exports, and it is clear that the MOU's are "enforceable"; India has confirmed both points.[42] The trade balancing requirement thus falls within the scope of this paragraph, and consequently it is "inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994". The Panel should explicitly reject India's assertion and should make an explicit finding that the trade balancing requirement is inconsistent with India's obligations under Article XI:1 of the GATT.

52. India also asserts, however, that any import restrictions imposed by the MOU's were eliminated when India eliminated its import licensing regime. The Panel should reject this additional argument as well.

53. The first difficulty with India's argument comes from the first sentence of Paragraph III, clause (vi) of the MOU. That sentence provides that "the party [*i.e.*, the MOU signatory] shall achieve a broad neutralization of foreign exchange *over the entire period of the MOU* in terms of balancing between the actual CIF value of imports of CKD/SKD kits/components and the FOB value of exports of cars and auto components over the said period." This provision imposes a trade balancing obligation on imports made over the full duration of the MOU; the trade

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[41] First Submission of India, para. 12(b).

[42] First Submission of India, para. 14, and *Replies by India to Questions Posed by Japan*, G/TRIMS/W/15, circulated 30 October 1998, answer to question 24; Exhibit US-5: "CKD/SKD kits imports would be allowed with reference to the extent of export obligation fulfilled in the previous year." As discussed above, the MOU's were also "necessary to obtain an advantage".

balancing requirement in the MOU is thus independent of the elimination of the import licensing regime.[43]

54. India has effectively confirmed this point in its answer to the Panel's questions. India said that "under paragraph 3(iv) of Public Notice 60 and paragraph III(iv) of the MOU's, the MOU signatory goes 'outside the ambit of the MOU' and will not require any import licenses once it achieves a 70% indigenisation level. However, the MOU signatory will be required to achieve neutralisation of the foreign exchange obligation incurred *on imports made up to that date.*"[44] Consequently, under the terms of the MOU, the export balancing requirement continues to attach to all imports made until the 70% indigenisation level is reached -- whenever that date arrives.[45] While India says elsewhere that no further export obligations will accrue with respect to imports made after April 1, 2001, that statement seems impossible to reconcile with India's own description of the meaning of the MOU's.

55. The second difficulty with India's assertion that the MOU's impose no separate import restriction arises from India's acknowledgment that they remain enforceable under Section 11 of the FT(DR) Act. In its response to the Panel's question 52, India says first that "failure to meet an export obligation after 1 April 2001 would not be an import or export prohibited by Section 11(1) of the FT(DR) Act." India adds, however, that "the companies may also be liable to monetary penalties under Section 11 of the FTDR Act" and that after 1 April 2001, "MOU signatories would be treated as licensees in respect of the licences that they have utilized up to 31 March 2001."[46]

56. Section 11 of the FT(DR) Act contains only one provision imposing monetary penalties: Section 11(2), which provides that

> ... where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the export and import policy, he shall be liable to a penalty not exceeding one thousand rupees or five times the value of the good in respect of which any contravention is made or attempted to be made, whichever is more.[47]

57. It appears, therefore, that the imposition of monetary penalties under Section 11 -- as contemplated by India for companies that fail to abide by the provisions of the MOU -- depends on the making of some export or import in contravention of Indian law. India has also said, however, that failure to meet an export obligation is not an export or import prohibited by

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[43] In fact, the trade balancing requirement imposed restrictions above and beyond those imposed by India's import licensing regime even when that regime was in force, because the requirement limited the amount of licenses that an MOU signatory could use.

[44] Indian Panel Answers, answer to question 50 (emphasis added).

[45] Furthermore, according to India, at least some manufacturers have not yet reached that level; Indian Panel Answers, answer to question 33.

[46] In the same answer India also confirms once again that after April 1, 2001, "MOU's potentially can be enforced as contracts through the domestic courts."

[47] Exhibit US-16.

Section 11(1). It is not at all clear how these two statements can be harmonized. One possible reconciliation of the provisions of Section 11 and India's statements is that while failing to export the mandated amount would not be a prohibited export or import (which is logical, since a *failure* to export hardly seems like a *prohibited* export, let alone an import of any kind), a car manufacturer's *imports* in future years in excess of the amount of export obligation discharged would be a prohibited import to which a monetary penalty under Section 11(2) applies.

58. With respect to the *indigenisation* requirement, India has yet to explain its own statements, to which the United States drew attention in its first submission: it is *India* that has said that the MOU's *as such* are intended to limit the importation of SKD/CKD kits/components when a firm fails to meet the indigenisation requirement in paragraph III, clause (iv) of the MOU: "As all the companies have achieved the desired level of indigenisation during the last two years (since issuance of Public Notice No. 60) the need *to invoke MOU's to impose limitation on them* has not arisen."[48] To the extent that the MOU's themselves prevent signatories from importing SKD/CKD kits if they do not meet the indigenisation targets, the indigenisation requirement as such is inconsistent with Article XI:1 of the GATT 1994.

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59. In summary: India's narrow interpretation of Article XI:1 is not supported by the provisions of the WTO Agreement; and its assertion that the trade balancing and indigenisation requirements in Public Notice No. 60 and the MOU's do not themselves impose import restrictions is not supported by the actual provisions of those measures or India's own statements. For all those reasons, the Panel should find that the trade balancing and indigenisation requirements are inconsistent with Article XI:1 of the GATT 1994.

C. The Panel Should Reject India's New Argument that the Measures in Question are Outside the Scope of the TRIMs Agreement

60. In our first submission, the United States explained that the indigenisation and trade balancing requirements are also inconsistent with Articles 2.1 and 2.2 of the TRIMs Agreement because:

-- The measures in question are trade-related investment measures;

-- The trade balancing and indigenisation requirements are inconsistent with GATT Articles III:4 and XI:1, and pursuant to Article 2.1 they therefore are inconsistent with the TRIMs Agreement; and

-- In addition, those requirements fall within the scope of Paragraphs 1(a), 1(b), and 2(a) of the Illustrative List annexed to the TRIMs; they are therefore inconsistent with the TRIMs Agreement pursuant to Articles 2.1 and 2.2 thereof.

[48] India's Answers to Questions by the United States, 13 July 2000, answer to question 5, Exhibit US-11 (underlining in original, other emphasis added).

61. Until its responses to the Panel's questions, India had raised no separate defenses with respect to the U.S. claims under the TRIMs Agreement. In reply to the Panel's question 61(a), however, India asserts for the first time that these measures are not "investment measures". India's position is without merit.

62. In the first place, India has not responded to any of the U.S. argumentation in the first submission on this question. As we explained,[49] these measures are "investment measures" for at least the following reasons:

-- They require a minimum foreign equity of US $50 million dollars. Such equity requirements are plainly designed to increase the inflow of foreign investment; under Public Notice No. 60 a company unwilling to invest that amount of foreign capital simply was not allowed to sign an MOU and receive the advantages it conferred.

-- They seek to steer foreign investment in the Indian motor vehicle manufacturing sector towards a particular kind of commercial and production structure. Paragraph 3(i) of Public Notice No. 60 and paragraph III, clause (iii), of the MOU both require "establishment of actual production facilities for manufacture of cars and not for mere assembly of imported kits/components."

-- Third, these measures are plainly meant to encourage investment in and the development of the Indian parts and components industry generally. The MOU makes that clear, because it provides that the manufacturing firm "shall aggressively pursue and achieve as soon as possible the development of the local supply base ... ." Moreover, Indian officials announcing Public Notice No. 60 said that the policy objective was "to encourage local production of auto-components and thus, bring in modern technology and develop this key segment".

-- Fourth, these measures fall within the scope of the Illustrative List, because they are applied to individual "enterprises" (*i.e.*, the car manufacturers) that are the result of foreign investment.

63. Furthermore, India's position is not consistent with the conclusions of the Panel in *Indonesia - Autos*, which found as follows:

> On the basis of our reading of these measures applied by Indonesia under the 1993 and the 1996 car programmes, which have investment objectives and investment features and which refer to investment programmes, we find that these measures are aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia. Inherent to this objective is that these measures necessarily have a significant impact on investment

[49] *See* First Submission of the United States, paras. 116-119 and footnote 110.

> in these sectors. For this reason, we consider that these measures fall within any reasonable interpretation of the term "investment measures".[50]

The measures in question in this dispute are like those in *Indonesia - Autos*: they are aimed at encouraging local manufacturing capability, and they have a significant impact on investments (foreign and domestic) in that sector. As that panel said, the measures in this dispute "fall within any reasonable interpretation of the term 'investment measures'."

64. India's only basis for its assertion appears to be that the measures in question are "trade measures". But even if India is correct that these are "trade measures", there is no reason to think that they are not also "investment measures" (and therefore *a fortiori* "trade-related investment measures"). India certainly offers no reason to believe that a measure can only be one or the other, and there is no support for that position in the text of the TRIMs Agreement.[51]

65. The indigenisation and trade balancing requirements are precisely the sort of trade-distorting measures applied to foreign investment that the TRIMs Agreement was intended to address. For all of the reasons given in this submission and our previous ones, India's assertion that these measures are not "investment measures" should be rejected.

IV. INDIA DOES NOT HAVE A VALID BALANCE-OF-PAYMENTS DEFENSE

66. India's submissions to the Panel appear to suggest that India believes it has a defense to the U.S. complaint under the balance-of-payments provisions of Article XVIII:B of the GATT 1994. It is actually not clear what India thinks on this point. Its first submission ends with a request that the Panel find that the measures applied when the panel requests were submitted are justified by Article XVIII:B of the GATT and Articles 3 and 4 of the TRIMs Agreement. In its supplementary oral statement at the first panel meeting, India "reserved its right to take up the defence that the measures are justified under Article XVIII:B."[52] However, when asked by the Panel about the justification of the measures at issue, India replied that "the restrictions on the importation of SKD/CKD kits were imposed in order to safeguard India's external financial position."[53] This is not the same thing as justifying the indigenisation and trade balancing requirements under Article XVIII:B. Moreover, although India concedes that the trade balancing

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[50] Report of the Panel in *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 25 September 1997, para. 14.80. The panel emphasized that its characterization of the measures as "investment measures" was based on an examination of the manner in which the measures at issue in that case related to investment, and that there might be other measures that qualify as investment measures within the meaning of the TRIMs Agreement because they relate to investment in a different manner.

[51] *Cf.* the Report of the Panel in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, adopted 25 September 1997, para. 7.185 ("the TRIMs Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related matters").

[52] Supplementary Statement of India at the First Meeting, para. 6.

[53] Indian Panel Answers, answer to question 63.

and indigenisation requirements remain in force after April 1, 2001, India also says that "as from 1 April 2001, India no longer applies any balance-of-payments measures and therefore no longer invokes the balance-of-payments provisions of the GATT."[54] The United States is therefore not certain whether India continues to assert a defense to the U.S. complaint under the balance-of-payments provisions of the WTO Agreement.

67. In any case, India has not met its burden of proof with respect to any such defense; it cannot surmount the procedural obstacles to any such defense; and India's external financial position has at all relevant times been so strong that it cannot meet the substantive requirements for invoking Article XVIII:B.

A. India Has Not Met Its Burden of Proof on the Balance-of-Payments Issue

68. The Appellate Body has provided guidance on the allocation of burden of proof in several reports. Particularly relevant are its conclusions in the *Wool Shirts* report:

> In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that *the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.* Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. *If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party*, who will fail unless it adduces sufficient evidence to rebut the presumption.[55]

69. In this case, India has provided no evidence whatsoever about its balance-of-payments situation. To the extent that India is asserting that its balance-of-payments position provides a legal justification for the measures at issue, it is responsible for providing proof of that assertion. It has done nothing of the sort. Having adduced no evidence of any kind on the point, India obviously has not adduced evidence sufficient to raise a presumption that it has a balance-of-payments problem justifying the measures in question. For that reason alone, any balance-of-payments defense must fail.

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[54] Indian Panel Answers, answer to question 65.

[55] Report of the Appellate Body in *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted on 23 May 1997, page 14 (footnotes omitted) (emphasis added).

B. India Has Not Met the Procedural Prerequisites for Justifying These Measures Under the Balance-of-Payments Provision of the GATT

70. GATT Article XVIII:B and the Understanding on the Balance-of-Payments Provisions of the GATT 1994 (the Understanding) establish procedural prerequisites to any invocation of the balance-of-payments provisions of the GATT.[56] These prerequisites also apply to the TRIMs Agreement, Article 4 of which permits developing country Members to deviate temporarily from the provisions of Article 2 *to the extent and in such a manner* as GATT Article XVIII and the Understanding permit.

71. These prerequisites include a requirement to consult with the Committee on Balance-of-Payments Restrictions (the Committee) concerning any new measures immediately after applying them (or, where prior consultation is practicable, as it almost certainly was in this case, before doing so).[57] India did not undertake such consultations; indeed, it did not even notify the measures challenged in this dispute to the Committee, despite the requirement that it do so within 30 days if they were significant or in India's annual notification if not.[58] Because India did not comply with those requirements, it cannot now assert a balance-of-payments justification for those measures, and for that reason as well the Panel should reject any such assertion.

C. India Also Does Not Meet the Substantive Requirements of the Balance-of-Payments Provisions of the GATT

72. Even if India were able to overcome the legal objections described in the foregoing paragraphs, India could not meet the substantive requirements of Article XVIII:B. The first substantive difficulty with India's assertion of a balance-of-payments justification for these measures arises from the fact that India adopted Public Notice No. 60 on December 12, 1997. Under GATT Article XVIII:9, a Member may institute balance-of-payments measures "provided that the import restrictions instituted, maintained or intensified shall not exceed those necessary: (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves."

73. However, as the United States pointed out in its first written submission,[59] the Panel in *India-QR's* found that, as of November 18, 1997 (only 24 days before Public Notice No. 60 was issued) India's balance-of-payments situation met none of the requirements in Article XVIII:9. The Panel found that:

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[56] Pursuant to GATT Article XVIII:9, a Member's right to maintain balance-of-payments measures is made subject to the provisions of Articles XVIII:10 to 12.

[57] Article XVIII:12(a). Pursuant to paragraph 6 of the Understanding, consultations are to be held within four months after the institution or intensification of restrictions.

[58] Understanding, para. 9.

[59] Para. 51.

> Overall, we are of the view that the quality and weight of evidence is strongly in favour of the proposition that India's reserves are not inadequate. In particular, this position is supported by the IMF, the Reserve Bank of India and three of the four methods suggested by India. Accordingly, we find that India's reserves were not inadequate as of 18 November 1997.[60]
>
> [...]
>
> We find that as of the date of establishment of this Panel [November 18, 1997], there was not a serious decline or a threat of a serious decline in India's monetary reserves, as those terms are used in Article XVIII:9(a).[61]
>
> [...]
>
> We find that as of the date of establishment of this Panel, India's monetary reserves of US$25.1 billion were not inadequate as that term is used in Article XVIII:9(b) and that India was therefore not entitled to implement balance-of-payments measures to achieve a reasonable rate of growth in its reserves.[62]

74. It strains all credulity to suggest that 24 days after November 18, 1997, India's foreign reserve situation had changed so dramatically as to justify new balance-of-payments measures. Certainly India has provided no facts to suggest that such a change occurred. And, as the United States explained in its answers to the Panel's questions, this Panel can and should be guided by those factual and legal findings of the *India-QR's* panel.[63]

75. Even if -- despite the foregoing points -- these measures could permissibly have been introduced under GATT Article XVIII:B in December of 1997, India would still be required to explain the basis on which it was maintaining them on May 15 and July 27, 2000, the dates on which the United States requested this Panel and on which this Panel was established.[64] Article XVIII:11 makes clear that a Member applying balance-of-payments measures "shall progressively relax any restrictions applied under this Section as conditions improve, *maintaining them only to the extent necessary* under the terms of paragraph 9 of this Article and *shall eliminate them when conditions no longer justify such maintenance*." In fact, however,

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[60] Panel Report in *India-QR's*, para. 5.176. This finding is a predicate for the Panel's ultimate finding under Article XVIII:9(b).

[61] Panel Report in *India-QR's*, para. 5.180.

[62] Panel Report in *India-QR's*, para. 5.183.

[63] Response of the United States to Questions from the Panel, paras. 48-50.

[64] Throughout its submissions, India says that the relevant date for a balance-of-payments analysis is the date on which a panel request is submitted. The *India-QR's* panel concluded instead that the relevant date is the date of panel establishment, and it made its findings as of that date (November 18, 1997). Panel Report in *India-QR's*, WT/DS90/R, adopted 22 September 1999, paras. 5.160 - 5.161. In this dispute, it makes no difference which date is chosen: as described below India's currency reserves on either date were more than adequate and not seriously declining, and consequently India lacked a balance-of-payments justification for its measures on both dates.

India did not have balance-of-payments difficulties at all in the spring of 2000, and therefore, under Article XVIII:11 it lacked any basis for maintaining them.

76. Without prejudice to the United States' position that India has failed to advance evidence required to sustain its burden to put forward at least a *prima facie* defense, the United States is providing with this submission materials from the Reserve Bank of India that demonstrate that India did not face balance-of-payments difficulties that would justify maintenance of the measures at issue in this dispute at the time when this Panel was requested and established. In its Annual Report for 1999-2000, which was published in August 2000, the Reserve Bank provided information about India's currency reserves over the preceding decade.[65] In December of 1998, those reserves had risen to US$ 30.1 billion (as compared to US$ 25.1 billion in November of 1997, the date as of which the *India-QR's* panel made its rulings). In December of 1999, the reserves had risen to US$ 34.9 billion.[66] According to the Reserve Bank's Weekly Statistical Supplement, on May 12, 2000, India's reserves stood at US$ 37.6 billion. On July 28, 2000, India's reserves stood at US$ 36.2 billion. In other words, between November of 1997 and the end of July 2000, India's reserves increased by more than 44%.

77. Furthermore, the Reserve Bank provided the following analysis of India's external position:

> The movements in India's foreign exchange reserves, in recent years, have kept pace with the requirements on the trade as well as the capital accounts. As a matter of policy, foreign exchange reserves are kept at a level that is adequate to cover the liquidity needs in the event of both cyclical and unanticipated shocks. Particularly after the South-East Asian currency crises, there has been a growing opinion that the central banks need to hold reserves far in excess of the levels that were considered desirable going by the conventional indicators. The import cover of reserves improved to about 8.2 months as at end-March 2000 as against 6.5 months as at end-March 1997 while the ratio of short-term debt to reserves declined to 10.6 per cent as at end-March 2000 from 25.5 per cent as at end-March 1997. Even in relation to a broader measure of external liabilities, foreign exchange reserves provide adequate cover. For instance, short-term debt and cumulative portfolio investment inflows taken together were only 59.3 per cent of reserves as at end-March 2000. These ratios remain, by and large, unchanged even if unencumbered reserves (gross reserves net of forward liabilities) are taken into account, given the relatively small size of forward liabilities in the Indian context. The strength of the foreign exchange reserves has also been a positive factor in facilitating flow of portfolio investment by FIIs and in reducing the 'risk premia' on foreign borrowings and Global Depository Receipts (GDR) / American Depository Receipts (ADR) issued by the Indian corporates. It is, however, important to note that unanticipated domestic or external

[65] The pages of the Annual Report and Weekly Statistical Supplement referred to in this submission are attached as Exhibit US-27. Links to these documents can be found on the website of the Reserve Bank of India, <http://www.rbi.org.in>.

[66] Annual Report, Appendix Table VI.8.

> developments, including undue volatility in asset prices in equity/bond markets, can create disproportionate pressures in the foreign exchange market in emerging economies.[67]

The Reserve Bank's confidence in the strength of India's currency reserve position -- as gauged not only by measures such as the total amount of reserves, but also by measures such as import cover, ratio of reserves to short-term debt, and ratio of reserves to short-term debt plus cumulative portfolio investment inflows, among others -- confirms what the growth and absolute size of India's foreign currency reserves themselves make clear: that India was not facing inadequate reserves, seriously declining reserves or the threat of a serious decline in the spring of 2000.

78. Finally, there would be several other substantive difficulties with any Indian assertion of a balance-of-payments justification for these measures. First, as the United States explained in its Opening Statement at the First Panel Meeting, Article XVIII:B authorizes developing country Members only to "control the general level of imports".[68] India has not explained, however, how an inconsistency with national treatment "controls the general level of imports." As the United States noted, once an item has been imported, the foreign exchange for that import has been expended; there is no balance-of-payments justification for permitting discrimination against that imported good.[69] Furthermore, India has also not explained how its introduction of these measures in late 1997 would be consistent with the requirement in paragraphs 2 and 3 of the Understanding to give preference to price-based measures. The indigenisation and trade balancing requirements are not import surcharges, import deposit requirements or other measures with an impact on the price of imported goods. India, however, has not provided the justification for these measures that the Understanding would require, and India therefore may not maintain them as balance-of-payments measures.

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79. In summary, India has not provided any argumentation that would overcome the serious legal difficulties with any assertion of a balance-of-payments justification for the indigenisation and trade balancing requirements. Nor has India provided any evidence that -- even if those legal objections could be overcome -- its foreign currency reserve position met the requirements of Article XVIII:B either at the time those measures were introduced or at the time this Panel was requested and established. To the contrary, the evidence of India's own central bank proves the opposite. India's assertion of a balance-of-payments justification for these measures should be rejected.

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[67] Annual Report, para. 6.31. Exhibit US-27 includes the paragraphs of the Annual Report devoted to India's foreign exchange reserves, paras. 6.24 - 6.31.

[68] GATT Article XVIII:9 and Understanding, para. 4

[69] India did not respond to the Panel's invitation to address this point. Indian Panel Answers, answer to question 65.

V. CONCLUSION

80. The United States respectfully requests that the Panel find that the indigenisation requirement and the trade balancing requirement of Public Notice No. 60 and the MOU's are inconsistent with Articles Article III:4 and XI:1 of the GATT 1994 and Articles 2.1 and 2.2 of the TRIMs Agreement. The United States further requests that the Panel recommend that India bring the measures challenged by the United States into conformity with India's obligations under the GATT 1994 and the TRIMs Agreement.

INDIA -- MEASURES AFFECTING THE AUTOMOTIVE SECTOR

(WT/DS146-175)

U.S. EXHIBITS (Revised as of April 25, 2001)

No.	Description
1.	Public Notice No. 60 and the standard-form MOU
2.	U.S. consultation request, 2 June 1999 (circulated 7 June 1999 as document WT/DS175/1)
3.	U.S. panel request, 15 May 2000 (circulated 18 May 2000 as document WT/DS175/4)
4.	The Export and Import Policy 1 April 1997 - 31 March 2002, as amended through 13 October 2000, Chapters 1 through 5
5.	"Replies by India to Questions Posed by Japan," G/TRIMS/W/15, circulated 30 October 1998
6.	ITC (HS) Classifications of Export and Import Items (sample pages)
7.	"Replies to Questionnaire on Import Licensing Procedures," G/LIC/N/3/IND/4, circulated 4 December 2000
8.	"Notification under Paragraph 9 of the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994," WT/BOP/N/24, 19 May 1997 (relevant pages)
9.	"India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products: Agreement under Article 21.3(b) of the DSU," WT/DS90/15, circulated on 17 January 2000
10.	ITC (HS) Import Licensing Note on SKD/CKD
11.	India's Answers to Questions by the United States, 13 July 2000
12.	Public Notice No. 3, dated 6 January 1998, issued by the Delhi Customs House
13.	"DGFT Open to Relaxation of Indigenisation Norms for Cars," *The Financial Express*, 12 January 1998
14.	India's Replies to Questions Posed by the United States, 10 May 1999
15.	The Handbook of Procedures, Volume 1, chapters 1 - 5 and 15

No.	Description
16.	The Foreign Trade (Development and Regulation) Act 1992
17.	Sections 11 and 111 of the Customs Act 1962 (and the table of contents of the Act)
18.	The Foreign Trade (Regulation) Rules, 1993
19.	Articles from the *Indian Express* and the *Financial Express* listing MOU signatories
20.	Indian Vehicle Production Data and New Vehicle Sales Data for 1998 and 1999 from the Association of Indian Automobile Manufacturers
21.	Indian notification to the United States under the U.S. – India BOP Settlement: Products To be Freed by 1 April 2001
22.	"Car Makers Have to Sign New MOU's in Accordance with New Automobile Policy", *Business Standard*, December 11, 1997
23.	"Centre Plans Tariff Cover for Auto-Ancillary Units," *The Financial Express*, August 2, 2000
24.	"India's New Automobiles Policy Will Protect Domestic Industry Using Tariffs, Officials Say," *BNA Daily Report for Executives*, August 22, 2000
25.	"Committee on Trade-Related Investment Measures: Minutes of the Meeting Held on 14 September 1998," G/TRIMS/M/9, circulated 13 January 1999
26.	"Notification under Article 5.1 of the Agreement on Trade-Related Investment Measures," G/TRIMS/N/1/IND/1/Add.1, circulated 16 January 1996
27.	Reserve Bank of India Annual Report, 1999-2000, and Weekly Statistical Supplement (excerpts)